78-1006

No.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

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In the Supreme Court of the United States

OCTOBER TERM, 1978

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

ALBERT EDWARD CLINES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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v.

ALBERT EDWARD GLINES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense and the other federal defendants,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

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[1] The other defendants are the Secretary of the Air Force and two Air Force officers responsible for implementing the challenged regulations at the time of respondent's military service.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-16a) is not yet reported. The opinion of the district court (App. B, *infra*, 17a-27a) is reported at 401 F. Supp. 127.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Air Force regulations that require military personnel to obtain approval before circulating petitions to members of Congress on Air Force bases are invalid under 10 U.S.C. 1034.

2. Whether Air Force regulations that require military personnel to obtain approval before circulating petitions on base violate the First Amendment.

CONSTITUTIONAL PROVISION, STATUTE AND REGULATIONS INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 10 U.S.C. 1034 provides:

> No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

3. Air Force Regulation (AFR) 30-1(9) provides in pertinent part:

> Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to petition the President, the Congress or other public officials. However, the public solicitation or collection of signatures on a petition by any person within an Air Force facility or by a member when in uniform or when in a foreign country is prohibited unless first authorized by the commander.

4. AFR 35-15(3)(a) provides:

> (1) No member of the Air Force will distribute or post any printed or written material other than publications of an official governmental agency or base regulated activity within any Air Force installation without permission of the commander or his designee. A copy of the material with a proposed plan or method of distribution or posting will be submitted when permission is requested. Distribution of publications and other materials through the United States mail or through official outlets, such as military libraries and exchanges, may not be prohibited under this regulation.
>
> (2) When prior approval for distribution or posting is required, the commander will deter-

mine if a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result. If such a determination is made, distribution or posting will be prohibited and HQ USAF (SAFOI) will be notified of the circumstances.

(3) Mere possession of materials unauthorized for distribution or posting may not be prohibited unless otherwise unlawful. However, such material may be impounded if a member of the Armed Forces distributes or posts or attempts to distribute or post such material within the installation. Impounded materials will be returned to the owner when departing the installation unless determined to be evidence of a crime.

(4) Distribution or posting may not be prohibited solely on the ground that the material is critical of Government policies or officials.

(5) In general, installation commanders should encourage and promote the availability to service personnel of books, periodicals, and other media which present a wide range of viewpoints on public issues.

STATEMENT

1. Air Force regulations provide that "the public solicitation or collection of signatures on a petition by any person within an Air Force facility * * * is prohibited unless first authorized by the commander," and that "[n]o member of the Air Force will distribute or post any printed or written material * * * without permission of the commander or his designee * * *." AFR 30-1(9), 35-15(3)(a)(1). Distribution of such material is prohibited if the commander determines that "a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result." AFR 35-15(3)(a)(2). The regulations provide that "[d]istribution or posting may not be prohibited solely on the ground that the material is critical of Government policies or officials." AFR 35-15(3)(a)(4).

In 1974, while respondent was on active duty as a captain in the Air Force Reserves, he drafted petitions to the Secretary of Defense and to several members of Congress opposing military hair length standards. Respondent was informed by his superiors at Travis Air Force Base that the on-base circulation of petitions was permitted only with the approval of the base commander. Respondent then circulated the petition off-base.

In April 1974, while respondent was at Anderson Air Force Base in Guam, he gave the petitions to an Air Force sergeant, who gathered eight signatures on the petitions. Because of the unauthorized circulation of the petitions, respondent was removed from active duty status and was charged with failure to meet the professional standards of a reserve officer. He declined to submit evidence on his behalf. The charges were sustained, and respondent was reassigned from the active reserve to the standby re-

serve. Respondent then filed this action seeking reinstatement and back pay, alleging that the prior approval regulations violated 10 U.S.C. 1034 and the First Amendment.

2. The district court granted respondent's motion for summary judgment.[2] The Court held that the regulations, "[o]n their face, * * * suffer from considerable overbreadth" (App. B, *infra*, 24a), and "impose[] a considerable burden upon the free exercise of the First Amendment right of petition for redress of grievances" (*id.* at 25a). Finding that "the military need to control petitioning arises only in extraordinary circumstances (such as in a combat zone * * * or in an induction center * * *)," the court concluded that the regulations violate the First Amendment (*id.* at 26a). The court entered a judgment declaring the prior approval requirement of the regulations to be unconstitutional, enjoining the Air Force from enforcing the regulations against

[2] The district court did not determine whether respondent had exhausted his administrative remedy before the Air Force Board for the Correction of Military Records. The court of appeals held, however, that the Board was an inappropriate forum for the resolution of "the essentially legal issues involved in this case" because it is "a clemency-oriented body" without authority to declare military regulations invalid (App. A, *infra*, 5a). Although we believe that the decision of the court of appeals on this issue was in error, see, *e.g.*, *Knehans* v. *Alexander*, 566 F.2d 312 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978); *Seepe* v. *Department of the Navy*, 518 F.2d 760 (6th Cir. 1975); *Horn* v. *Schlesinger*, 514 F.2d 549 (8th Cir. 1975), we now waive the exhaustion requirement and do not raise it in this petition.

respondent, and ordering the respondent's reinstatement to active duty with $22,032.91 in back pay.

3. *a.* The court of appeals affirmed in part and vacated and remanded in part. Relying on its decision in *Allen* v. *Monger*, 583 F.2d 438 (9th Cir. 1978), and on *Huff* v. *Secretary of the Navy*, 575 F.2d 907 (D.C. Cir. 1978), petition for cert. pending, No. 78-599, the court held that Section 1034 prohibits the application of the prior approval requirement to the distribution of petitions to members of Congress at the Guam air force base (App. A, *infra*, 7a-9a).[3]

b. 10 U.S.C. 1034 concerns only petitions to members of Congress, and one of respondent's petitions was addressed to the Secretary of Defense. The court of appeals therefore reached the question whether the prior approval requirement of the regulations is constitutional (App. A, *infra*, 9a). The court stated that the requirement is "obviously a prior restraint on speech, and prior restraints have the heaviest burden of justification under the First Amendment" (*id.* at 11a). The court concluded that there is no sufficient justification for the challenged regulations.

Although it recognized the special disciplinary needs of the military, the court held that the military interests could be satisfied through alternative means, such as "[p]unishment after the fact for genuinely disruptive petitions, limitation of circulation to certain areas and to off-duty periods, and

[3] We are filing a petition for a writ of certiorari in *Allen* concurrently with this petition. We have furnished copies of the petitions in *Allen* and *Huff* to counsel for respondent.

protection from pressure by superiors who are seeking signatures" (*id.* at 11a-12a). While the court stated that the regulations may be constitutionally valid in a combat-zone setting, the court concluded that the regulations were wholly unconstitutional because of their overbroad application to protected activity (*id.* at 13a).[4]

Despite holding the regulations unconstitutional, the court of appeals observed that monetary claims against the government for amounts in excess of $10,000 are within the exclusive jurisdiction of the Court of Claims and therefore vacated the award of back pay (*id.* at 14a-16a). The court remanded the case to the district court with instructions to dismiss the claim for back pay without prejudice or to transfer it to the Court of Claims (*id.* at 16a).

REASONS FOR GRANTING THE PETITION

1. The question of the validity of the challenged regulation under 10 U.S.C. 1034, as applied to petitions to members of Congress, is pending before this Court in *Secretary of the Navy* v. *Huff*, petition for cert. pending, No. 78-599, and *Brown* v. *Allen*, in which a petition is being filed concurrently with the present petition. We therefore believe that the disposition of this aspect of the petition may be deferred pending the Court's disposition of *Huff*.

[4] The court of appeals distinguished *Greer* v. *Spock*, 424 U.S. 828 (1976), which upheld the constitutionality of prior approval regulations at Fort Dix, on the ground that *Greer* involved civilian activity on the base, while this case concerns military personnel (App. A, *infra*, at 12a-13a).

2. If the Court were to grant our petition in *Huff* and determine that the challenged regulations do not violate 10 U.S.C. 1034, it could then resolve the question whether the regulations are consistent with the First Amendment.[5] Our petition in *Huff* contends (Pet. 10-14) that the prior approval requirement of the military regulations is a constitutional means of ensuring the ability of the military to perform its essential mission. Because the Court may properly reach this issue in *Huff*, we believe that this aspect of the petition in this case may also be deferred pending the Court's disposition of our petition in *Huff*. If the Court should decide *Huff* without reaching the constitutional question, then it should grant review in the instant case.

CONCLUSION

The Court should defer disposition of the petition pending disposition of *Secretary of the Navy* v. *Huff*.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

[5] A conclusion that the regulations are unconstitutional would be an alternative ground for supporting the judgment of the court of appeals in *Huff*. The constitutionality of the regulations is, of course, raised directly here.

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 76-1412

ALBERT EDWARD GLINES, APPELLEE

v.

JAMES L. WADE, Commander 349th Material Airlift Wing, MAJOR GENERAL GONGE, Commander 22nd Air Force, JOHN L. MCLUCAS, Secretary of the Air Force, JAMES SCHLESINGER, Secretary of Defense, APPELLEANTS

Oct. 5, 1978

Appeal from the United States District Court for the Northern District of California.

Before GOODWIN and HUG, Circuit Judges, and PALMIERI,* District Judge.

GOODWIN, Circuit Judge:

The government appeals a judgment ordering reinstatement in the Air Force, back pay, and declaratory relief which struck down as unconstitutional certain Air Force regulations.

We affirm the nonmonetary parts of the judgment but vacate that portion awarding back pay as beyond the jurisdiction of the district court to grant.

Albert Glines was a Captain in the Air Force Reserves. While on active duty, he took training as a

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* The Honorable Edmund L. Palmieri, United States District Judge for the Southern District of New York, sitting by designation.

navigator instructor. Air Force standards describing maximum hair length offended him. To show his opposition, he drafted essentially identical petitions to several members of Congress and to the Secretary of Defense.[1] He intended to seek signatures to the petitions at his home station, Travis Air Force Base. Captain Glines learned, however, that Air Force Regulation 30-1(9) prohibits "the public solicitation or collection of signatures on a petition by any person within an Air Force facility * * * unless first authorized by the commander" and that AFR 35-15(3)(a)(1) prohibits the distribution of "any printed or written material * * * within any Air Force installation without permission of the Commander or his

[1] The petitions were identical except for the names of the person to whom they were directed and of the others to whom petitions were also being sent. That to the Secretary of Defense read:

"Dear Secretary of Defense:

"We the undersigned, all American citizens serving in the Armed Services of our nation, request your assistance in changing the grooming standards of the United States Air Force.

"We feel that the present regulations on grooming have caused more racial tension, decrease in morale and retention, and loss of respect for authorities than any other official Air Force policy.

"We are similarly petitioning Senator Cranston, Senator Tunney, Senator Jackson, and Congressman Moss in the hope that one of our elected or appointed officials will help correct this problem."

designee."[2] Because of these regulations, Captain Glines first circulated the petitions off base. Later he

[2] AFR 30-1(9) reads:

"9. *Right of Petition.* Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to petition the President, the Congress or other public officials. However, the public solicitation or collection of signatures on a petition by any person within an Air Force facility or by a member when in uniform or when in a foreign country is prohibited unless first authorized by the commander."

AFR 35-15(3)(a) reads:

"3. *Specific Guidelines and Prohibited Activities:*

a. *Possession and Distribution of Written or Printed Materials:*

(1) No member of the Air Force will distribute or post any printed or written material other than publications of an official governmental agency or base regulated activity within any Air Force installation without permission of the commander of his designee. A copy of the material with a proposed plan or method of distribution or posting will be submitted when permission is requested. Distribution of publications and other materials through the United States mail or through official outlets, such as military libraries and exchanges, may not be prohibited under this regulation.

(2) When prior approval for distribution or posting is required, the commander will determine if a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result. If such a determination is made, distribution or posting will be prohibited and HQ USAF (SAFOI) will be notified of the circumstances.

(3) Mere possession of materials unauthorized for distribution or posting may not be prohibited unless otherwise unlawful. However, such material may be im-

decided to ignore the regulations and to circulate the petitions on base. He also shaved his head.

The record does not show whether Captain Glines actually circulated the petitions on the Travis reservation. In April 1974, during a stopover at Guam, he gave copies of the petitions to a Sergeant Wolf. Sergeant Wolf gained eight signatures on Guam before base authorities learned of his activities, stopped them, and helped the signatories learn "the error of their ways". The Air Force immediately removed Captain Glines from active duty and soon afterwards reassigned him to the standby reserves. As a "standby" he was unable to complete his navigator instructor instructor training and lost other benefits.

Captain Glines brought this action alleging that the regulation of petitions violated 10 U.S.C. § 1034 and the First Amendment. He sought reinstatement and back pay. The district court declared the regulations void for statutory and constitutional infirmities, ordered Captain Glines reinstated in the active re-

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pounded if a member of the Armed Forces distributes or posts or attempts to distribute or post such material within the installation. Impounded materials will be returned to the owner when departing the installation unless determined to be evidence of a crime.

(4) Distribution or posting may not be prohibited solely on the ground that the material is critical of Government policies or officials.

(5) In general, installation commanders should encourage and promote the availability to service personnel of books, periodicals, and other media which present a wide range of viewpoints on public issues."

serve, and awarded him more than $22,000 in back pay. *Glines* v. *Wade*, 401 F.Supp. 127 (N.D.Cal. 1975). The government appeal challenges the judgment on a number of grounds.

1. *Exhaustion of Administrative Remedies*

The government first argues that the district court should have required Captain Glines to seek relief from the Air Force Board for the Correction of Military Records (AFBCMR) before bringing this action. This point is not well taken.

Captain Glines' claim depends on constitutional and statutory interpretations which are beyond the scope of the jurisdiction of the AFBCMR. While the government treats the case as simply a claim for reinstatement and back pay, Captain Glines also sought and received a declaratory judgment invalidating the challenged regulations. Without this judgment he would remain subject to the regulations after his restatement. "Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board." *Downen* v. *Warner*, 481 F.2d 642, 643 (9th Cir. 1973).

The AFBCMR was never intended by Congress to resolve the essentially legal issues involved in this case. Like other BCMRs, it is a clemency-oriented body, with authority to "correct an error or remove an injustice," 10 U.S.C. § 1552(a), not to declare the law. The Board simply substitutes for private congressional bills its remedy for individual grievances.

Congress stopped accepting such private bills when it authorized the BCMRs. 2 U.S.C. § 190g. BMCRs are not necessarily legally trained. They get their legal advice from the Judge Advocate General's office. *See, e.g., Flute* v. *United States*, 535 F.2d 624, 627-28, 210 Ct.Cl. 34 (1976). The AFBCMR has no authority to declare the challenged regulations invalid. Even if it gave Captain Glines all the redress within its power, it would not be able to protect him from further attempts by the Air Force to enforce its regulations. Only a court can do so.[3]

We recently held that a district court may require exhaustion to a BCMR, in its discretion, after balancing the relevant factors. *Montgomery* v. *Rumsfeld*, 572 F.2d 250, 252-54 (9th Cir. 1978). The district court, of course, did not have the opportunity to do the balancing we suggested in *Montgomery*. However, the district court did not in this case require exhaustion, and, for the reasons indicated, we agree with the district court.[4]

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[3] *Schlesinger* v. *Councilman*, 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1974), which the government cites, involved a district court's authority to enjoin a court-martial allegedly acting in excess of its jurisdiction. A courtmartial is, of course, a legally oriented body, as are the military appeals courts. They are competent to decide their own jurisdiction, and they do not take their legal advice directly from the Judge Advocate General's office.

[4] This court recently outlined in substance the following test of reviewability in a case brought by an enlisted member of an armed branch who objected to his duty assignment:

(1) The plaintiff must allege the denial of a constitutional right and the exhaustion of his military remedies.

[Footnote continued on page 7a]

II. *Statutory Claim*

10 U.S.C. § 1034 prohibits restrictions on communications between members of the military and members of Congress unless the communication is unlawful or the restrictions are necessary to the national security.[5] In *Allen* v. *Monger*, —— F.2d —— (slip opin. p. 3239) (9th Cir. 1978), we struck down under § 1034 Naval regulations requiring prior approval for the circulation of petitions on a ship at port in the United States. We held that the Navy's system of prior restraints was not necessary to the national security in the factual situation described in the *Allen* case.

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[4] [Continued]

(2) If the plaintiff satisfies step (1), he must then show that judicial review is warranted upon a proper balancing of the following considerations:

(a) the nature and strength of his claim;

(b) the extent of his potential injury if review is denied;

(c) the degree of civilian interference with the military mission if the court grants review; and

(d) the extent to which the decision to be reviewed was based upon military expertise.

Schlanger v. *United States*, —— F.2d —— (9th Cir., Sept. 11, 1978).

In the case at bar, Glines satisfies all the tests set forth in *Schlanger, supra*, even though, as the factual situations in the two cases reveal, the cases have little but the military uniform in common.

[5] 10 U.S.C. § 1034 reads:

"No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."

The District of Columbia Circuit has upheld similar restrictions when applied to an actal combat zone. *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 511 F.2d 1327 (1975). On the other hand, the same court has struck down regulations inconsistent with § 1034 when they were applied to a combat-ready base in Japan. *Huff* v. *Secretary of Navy*, 188 U.S.App. D.C. ——, 575 F.2d 907 (1978). The base commander filed an affidavit emphasizing the combat-ready nature of the base, but the majority found his argument unpersuasive.

The record now before us does not indicate the precise nature of the base on Guam where Captain Glines handed Sergeant Wolf the petitions. The government has not shown that Guam was more sensitive or that petitioning on that base was inherently more disruptive than was true of the base involved in *Huff*. While prior restraints on petitioning may promote some military objectives, the government has not shown that such restraints are actually necessary to the national security outside of a combat zone.

Despite proper deference to the military's ability to judge the impact of unauthorized petitioning on discipline, we do not believe the government has shown that the bad effects of petitioning would endanger the national security in these circumstances.[6] This is a determination we must make independently, for

[6] Glines was disciplined for violating the regulations requiring prior approval. The Air Force does not contend that he did anything else that would have subjected him to discipline.

Congress in adopting § 1034 has consciously restricted military command discretion on this point.

Only if we determine that the petitions are a threat to national security can we uphold the military restriction. "[W]e do not think that the national security can be said to require that the objective of military discipline be pursued to the exclusion of all other interests. If this were the case, then § 1034 would be a nullity, for restrictions on petitioning activity, as on other types of speech, can always be said to decrease the possibility of lapses of military discipline." *Huff* v. *Secretary of the Navy*, 188 U.S. App.D.C. at ——, 575 F.2d at 914. Congress adopted § 1034 because it preferred free communication with military personnel to absolute discipline in the military; AFR 30-1(9) and 35-15(3)(a) improperly ignore the Congressional policy.[7]

III. *Constitutional Claims*

Read literally, § 1034 protects only the four petitions addressed to members of Congress. One petition, which was essentially identical to the others, was addressed to the Secretary of Defense. This petition requires us to decide whether the First Amendment also protects Glines' activities.

It is clear that these regulations would be unconstitutional on their face if they applied to the public

[7] This discussion assumes that military discipline and free speech are necessarily incompatible. There is a strong argument to the contrary. Donald N. Zillman, *Free Speech and Military Command*, 1977 Utah L.Rev. 423, 433-34.

at large. Prior restraints on speech face a heavy burden of justification, which they are seldom able to meet. *New York Times Co.* v. *United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); *Near* v. *Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). First Amendment rights do not expire upon enlistment in a military arm, although the needs of the service may modify the extent of the application of these rights. "Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected." *Parker* v. *Levy*, 417 U.S. 733, 758-59, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), quoting, at 759, 94 S.Ct. at 2563, *United States* v. *Gray*, 20 U.S.C.M.A. 63 (1970). The issue in *Parker* v. *Levy* was whether various Articles of the Uniform Code of Military Justice were too vague to support a conviction for statements urging enlisted men to disobey orders. The Supreme Court held that they were not. There was no prior restraint involved.

The First Amendment protects this country's basic commitment to open and vigorous debate. We have assumed as a nation that free discussion will be likely to lead to the right decisions, that, as Justice Brandeis said, when falsehoods and fallacies abound, "the remedy to be applied is more speech, not enforced silence." *Whitney* v. *California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). The First Amendment reflects a conscious choice to prefer citizen autonomy to conformity.

A requirement for precirculation clearance is obviously a prior restraint on speech, and prior restraints have the heaviest burden of justification under the First Amendment.

> ". . . [P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights * * *.
>
> "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least, for the time." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683 (1976).

The military need for obedience and discipline may justify certain restrictions on speech that would be impermissible in civilian life. As *Parker* v. *Levy*, *supra*, shows, speech that poses a genuine threat of undermining obedience to orders may subject the speaker to appropriate punishment.[8] If Glines' activities had violated regulations that focused on these considerations, the Air Force's response might be acceptable. Punishment after the fact for genuinely disruptive petitions, limitation of circulation to certain areas and to off-duty periods, and protection from pressure by superiors who are seeking signa-

[8] We do not believe that vocal disagreement with public policy by itself necessarily leads to disobedience to orders. "I think, and any society which truly believes in a First Amendment must assume, that soldiers like other citizens can disagree with governmental policy and yet still realize that they must follow the legal requisites of that policy, including military service, until the policy is changed by democratic means." *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 335, 511 F.2d 1327, 1337 (1975) (Bazelon, J., dissenting).

tures would adequately protect the government's interest.[9]

The Supreme Court insists on less restrictive alternatives to prior restraint when they are available, and it critically examines whether the restraint will have its intended effect. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. at 563-70, 96 S.Ct. 2791. Less restrictive alternatives are available.

We have emphasized that these regulations are prior restraints on speech. The government suggests that they are, instead, merely time, place, and manner restrictions. This is how the District of Columbia Circuit treated the same regulations as applied in a combat zone. *Carlson* v. *Schlesinger*, *supra*. A combat zone, of course, is only a small part of the total military deployment. Restrictions there do not necessarily support restrictions throughout all other military reservations. Indeed, to treat these regulations as time, place, and manner restrictions necessarily implies that there must be other places within the military jurisdiction where petitioning by military personnel is permitted. Assuming that we would agree with the majority in *Carlson*, therefore, we do not think *Carlson* compels us to give combat-zone status to the regulations when applied here.

The Supreme Court also treated similar restrictions applied to civilian political campaigning as time, place, and manner restrictions in *Greer* v. *Spock*, 424

[9] See the limitations the district court adopted, and we approved on appeal, *Allen* v. *Monger*, 404 F.Supp. 1081, 1090 (N.D.Cal. 1975), *aff'd supra*.

U.S. 828, 86 S.Ct. 1211, 47 L.Ed.2d 505 (1976). The question there was whether uninvited civilians could come on the base, where they had no clear right to be, for political purposes. That is quite a different question from that of direct restraints upon the exercise by military personnel of the right of free speech.

It may be argued that the challenged regulations cover activity, such as petitioning in a combat zone, on which the military may legitimately impose prior restraints. The regulations are nevertheless void because they are overbroad. Since they affect Glines' activities, he has standing to challenge their overbreadth. *Parker* v. *Levy*, 417 U.S. at 760-61, 94 S.Ct. 2547; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

Overbreadth appears from a cursory reading. The regulations deal with protected expression and could cover virtually all controversial written material. The commanding officer makes the decisions, and his views are centered on his command, not on abstract First Amendment values. The regulations, indeed, allow him to prohibit distribution partly because "the material is critical of Government policies or officials." AFT 35-15(a)(4). Glines' case itself shows that commanding officers may be unsympathetic to even the most innocuous exercise of First Amendment rights. Finally, the restrictions exceed anything essential to the government's interests. *United States* v. *O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1967). The regulations are valid, if at all, only in the limited setting of a combat zone. Their over-

breadth is substantial.[10] *Broadrick* v. *Oklahoma*, 413 U.S. at 615-16, 93 S.Ct. 2908.

IV. *Jurisdiction to Award Damages*

For the reasons we have already given, we hold that the district court was correct in declaring the regulations void, enjoining their enforcement, and ordering Glines reinstated in a status that is consistent with his status before he was relieved from active duty. However, it lacked jurisdiction to award him back pay, and we must vacate that part of its judgment.

Under the Tucker Act, a district court has jurisdiction to award damages against the United States to a maximum of $10,000. All other monetary claims must go to the Court of Claims. 28 U.S.C. § 1343(a)(2). There is no such restriction on actions seeking nonmonetary relief or actions claiming that a government official acted in violation of the Constitution or of statutory authority. The reason is that in these situations Congress has either waived sovereign immunity or the doctrine does not apply. 5 U.S.C. § 702; *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689-91, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *Hill* v. *United States*, 571 F.2d 1098, 1102 (9th Cir. 1978); 14 Wright, Miller, and Cooper, Federal Practice and Procedure § 3655 (Supp. 1977). These doctrines justify the district court's judgment except for its award of back pay. Since the Court of Claims is without jurisdiction to grant general declaratory or equitable relief, the district court had no reason to defer to it. 28 U.S.C. § 1491; *United States* v. *Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976); *United States* v. *King*, 395 U.S. 1, 3, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969).

[10] The majority in *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. at 331-332, 511 F.2d at 1333-34, also questioned the regulations' breadth but stopped short of a finding of overbreadth. Judge Bazelon, dissenting, viewed them as invalid, as applied, and overbroad. 167 U.S.App.D.C. at 333, 511 F.2d at 1335.

Congress has waived sovereign immunity when damages will be paid from the public treasury only if the claimant sues under the Tucker Act in the proper court. Glines did not plead Tucker Act jurisdiction, and in any event the district court awarded him an amount in excess of its Tucker Act authority. While a district court may give damages as an incident to a declaratory judgment, it may do so only if such relief would otherwise be within its jurisdiction. 28 U.S.C. §§ 2201, 2202; *United States* v. *King*, 395 U.S. at 3-4, 89 S.Ct. 1501.

Glines argues that sovereign immunity is inapplicable, and the district court therefore had jurisdiction under 28 U.S.C. § 1331, because he alleged that the regulations are unconstitutional and in violation of a statute. He cites *Larson* v. *Domestic and Foreign Commerce Corp.*, *supra*, in support of his position. However, he does not come within the *Larson* exception to sovereign immunity. The Supreme Court specifically noted in *Larson* that a suit would still fail as against the sovereign if relief would require affirmative action or the disposition of sover-

eign property. 337 U.S. at 691 n.11, 69 S.Ct. 1457. Glines' action is of this nature. His relief must come from the Court of Claims. The government, of course, could not relitigate in that forum any issues which have been decided against it here.

We affirm the judgment of the district court except for its award of back pay. We vacate that award and remand it to the district court with instructions either to dismiss the claim without prejudice to another action in the Court of Claims or to transfer that part of the case to the Court of Claims directly. *Sherar* v. *Harless*, 561 F.2d 791, 794 (9th Cir. 1977).

Affirmed in part: vacated and remanded in part.

APPENDIX B

UNITED STATES DISTRICT COURT
N. D. CALIFORNIA

No. C-74-1264 WHO

ALBERT EDWARD GLINES, CAPTAIN USAF RESERVES, PLAINTIFF

v.

JAMES L. WADE, COMMANDER 349TH MATERIAL AIRLIFT WING, ET AL., DEFENDANTS

May 30, 1975

David M. Cobin, Breecker, Cobin & Dayley, Oakland, Cal., for plaintiff.

James L. Browning, Jr., U.S. Atty., Stephen A. Schefler, Asst. U.S. Atty., San Francisco, Cal., for defendants.

MEMORANDUM OPINION AND ORDER

ORRICK, District Judge.

This case concerns the constitutionality of certain Air Force regulations which limit the right of Air Force members to circulate petitions. The cause came on for hearing on cross-motions for summary judgment on May 13, 1975. Having considered the pleadings, the affidavits, the memoranda of points and authorities, and oral argument, for the reasons here-

inafter stated, plaintiff's motion for summary judgment is granted, and defendants' motion for summary judgment is denied.

I.

The material facts are undisputed. Stated briefly, plaintiff, a captain in the Air Force Reserves, was on active duty at Travis Air Force Base in April, 1974. He prepared a petition addressed to certain members of Congress requesting assistance in obtaining a relaxation of Air Force rules on hair length and, while on a routine training flight to Anderson Air Force Base in Guam, he allowed a blank copy of the petition to fall into the hands of another serviceman. This was in violation of Air Force Regulations AFR 30-1(9) and AFR 35-15, which state as follows:

> AFR 30-1(9):
>
> "*Right of Petition.* Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to petition the President, the Congress or other public officials. However, the public solicitation or collection of signatures on a petition by any person within an Air Force facility or by a member when in uniform or when in a foreign country is prohibited unless first authorized by the commander.
>
> Reference: AFR 35-15"
>
> AFR 35-15:
>
> "* * *
>
> 3.a. *Possession and Distribution of Written or Printed Materials:*
>
> * * * *

> (2) When prior approval for distribution or posting is required, the commander will determine if a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result. If such a determination is made, distribution or posting will be prohibited and HQ USAF (SAFOI) will be notified of the circumstances.
>
> * * * *
>
> (4) Distribution or posting may not be prohibited solely on the ground that the material is critical of Government policies or officials."

Defendants, plaintiff's superiors, determined that for violating such regulations by failing to ask permission of the commander before circulating his petition, plaintiff was to be removed from active duty and reassigned to Standby Reserve. Plaintiff was so transferred effective July 10, 1974; in consequence, he lost and continues to lose salary, retirement benefits, and flight experience.

II.

The sole question of law presented on these facts is whether the Air Force Regulations thus restricting the right of petition on Air Force bases violate the First Amendment to the Constitution of the United States. If so, it was unlawful to discipline plaintiff for the above-described violation of said Regulations (*Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 151, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969)), and he is, therefore, entitled to reinstatement and compensation for the losses suffered by virtue of such discipline.

Military regulations have traditionally been subject to a somewhat different constitutional standard than that applying to laws regulating civilians. The applicable standard involves a balancing of individual liberties against the public interest in accommodating legitimate military needs. *Carlson* v. *Schlesinger*, 511 F.2d 1327, 1332 (D.C. Cir. 1975); *Callison* v. *United States*, 413 F.2d 133, 136 (9th Cir. 1969). Civilian standards as to First Amendment freedoms are to apply unless it appears that "conditions peculiar to military life require a different rule". *Kauffman* v. *Secretary of the Air Force*, 135 U.S. App.D.C. 1, 415 F.2d 991, 997 (1969), *cert. den.* 396 U.S. 1013, 90 S.Ct. 572, 24 L.Ed.2d 505 (1970). However, with respect to petitions to Congress, any restrictive regulation must actually be necessary to the security of the United States.[1]

There is, moreover, a general recognition by the judiciary that the military system of command requires that considerable latitude be given the Armed

[1] 10 U.S.C. § 1034 provides:

> "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."

It appears clear that under this statute, as well as under the First Amendment itself, the right to petition Congress encompasses the right to solicit the signatures of others on petitions. Plaintiff has cited numerous cases to that effect, and this Court is not aware of any to the contrary. In *Carlson* v. *Schlesinger, supra*, at 1341 n. 21 (dissenting opinion), Chief Judge Bazelon advances the same view, and the majority opinion in that case does not seriously dispute it (*Id.* at 1333).

Forces in regulating and disciplining military personnel. *Parker* v. *Levy*, 417 U.S. 733, 758-759, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). This is based in part on the view that military officials are better qualified than judges to assess military needs and weigh the negative impacts on military effectiveness of certain types of speech or conduct.[2] While this concept necessarily limits the scope of review by the Court, it does not destroy jurisdiction altogether. In a case involving the very same regulations which are at issue here, the Court of Appeals for the District of Columbia recently stated that the latitude to be permitted in prescribing regulations varies with the magnitude of the governmental or military interest involved. *Carlson* v. *Schlesinger, supra*, at 1332. That being so, the Court must make a threshold determination as to the military interest at stake before proceeding to apply the balancing test articulated above.

In the *Carlson* case, it was held that in a combat zone setting (Vietnam), the military interest was manifest; therefore, a prior approval requirement for petitioning activities was reasonable, and the latitude to be afforded a commanding officer in applying the regulation was substantial. Under such circumstances, the *Carlson* court concluded it should not up-

[2] *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94, 73 S.Ct. 534, 97 L.Ed. 842 (1953); *Carlson* v. *Schlesinger, supra*, at 1333; *Dash* v. *Commanding General*, 307 F.Supp. 849, 853 (D.S.C. 1969), *aff'd* 429 F.2d 427 (4th Cir. 1970), *cert. den.* 401 U.S. 981, 91 S.Ct. 1192, 28 L.Ed.2d 333 (1971). See also, Chief Justice Earl Warren, The Bill of Rights and the Military, 37 N.Y.U.L.Rev. 181, 187 (1962).

set the military ruling "unless the military infringement upon first amendment rights [was] manifestly unrelated to legitimate military interests". *Id.* at 1333. The court, therefore, did not reach the question of the facial constitutionality of the regulations. *Id.* at 1334.

In the case at bench, the proscribed activity did not take place in a combat zone or during a time of war. It occurred at Guam in 1974. The military need to restrict peaceful petitioning activities appears, therefore, relatively insubstantial, and the Court may weigh the reasonability of the regulations with impunity.

AFR 30-1(9) requires prior approval by the commanding officer of *any* on-base solicitation of petition signatures at any time, as well as any off-base solicitation while in uniform or when in a foreign country. No distinction is made between combat and non-combat circumstances. No distinction is made between potentially inflammatory subjects and non-controversial material. No distinction is made between solicitation tending to interrupt or interfere with on-going military duties and solicitation at other times. The requirement applies to a broad range of petitioning activities which would unquestionably be protected in all but the most extreme military emergencies.

AFR 35-15 purports to provide guiding standards for commanders enforcing AFR 30-1(9). Consequently, it must be scrutinized together with AFR 30-1(9)

in order to determine the constitutionality of both, because:

> "* * * a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth* v. *Birmingham*, *supra*, at 150.

AFR 35-15 creates no categories of petitions or circumstances to be exempted from the prior authorization requirement. The commander is clearly to pass upon *all* petitions to be circulated. The guidelines permit the commander to prohibit petition circulation upon a determination that it presents a "clear danger "to loyalty, discipline or morale' or that it materially interferes with "accomplishment of a military mission".[3] These guidelines are, therefore, substantially broader than those prescribed by Congress in 10 U.S.C. §1034, which permits only such regulation as is "necessary to the security of the United States". Arguably, under *Parker* v. *Levy*, *supra*, the limiting construction given the terms "loyalty, discipline and morale" by long military usage and interpretation might narrow the scope of AFR 35-15. But, as pointed

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[3] Moreover, the *caveat* in AFR 35-15 that signature gathering "may not be prohibited *solely* on the ground that the material is critical of government policies or officials" (emphasis added) implies that the critical nature of the material may properly be at least a secondary ground for denying permission.

out in the dissenting opinion in *Carlson* v. *Schlesinger*, *supra*, at 1342-1343, guidelines regulating *conduct* which are narrow enough to pass constitutional muster may not be sufficiently narrow when they regulate protected *speech* instead.[4] Furthermore, even narrowly construed, the terms are far broader than the outer limits on restriction set by Congress.

On their face, therefore, the regulations suffer from considerable overbreadth.[5] A law is overbroad "if in its reach it prohibits constitutionally protected conduct." *Grayned* v. *City of Rockford*, 408 U.S. 104, 114, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972). Even without actual prohibition, the chilling effect which inheres in overly broad restrictions in general[6] is particularly apparent in a military setting, where petitions addressed to members of Congress are very likely to involve complaints about military policies or about the administration of military affairs by su-

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[4] The Supreme Court in *Parker* v. *Levy*, *supra*, at 756, 94 S.Ct. 2547, also notes this rule, citing *Smith* v. *Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974).

[5] They may also suffer from vagueness, but vagueness is not an issue here since plaintiff has no standing to raise it. Since AFR 30-1(9) requires prior permission for circulating *any* petition, plaintiff could have had no doubt of its applicability to him. See *Parker* v. *Levy*, *supra*, at 756, 94 S.Ct. 2547.

[6] *Steffel* v. *Thompson*, 415 U.S. 452, 462, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Grayned* v. *City of Rockford*, *supra*, at 114, 94 S.Ct. 2294; *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-487, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); *NAACP* v. *Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

perior officers.[7] To require that all petitions to be circulated be passed upon first by the base commander imposes a considerable burden upon the free exercise of the First Amendment right of petition for redress of grievances.

Balanced against that burden is the legitimate need of the military to restrict the circulation of certain petitions under certain circumstances. Those circumstances are spelled out by Congress in 10 U.S.C. § 1034,[8] and it would be improper for this Court to imply the existence of any others.[9] It is not seriously disputed that a petition like plaintiff's, involving a subject as innocuous as Air Force grooming standards and circulated without fanfare, falls far outside those legitimate areas of military concern. It must, of course, be recognized that the Supreme Court has indicated First Amendment restrictions should not be declared unconstitutional for overbreadth where they could validly be applied to numerous situations and invalidly to only "marginal" situations. *Parker* v. *Levy*, *supra*, at 760. But that is not the case here.

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[7] Such was the case here, as well as in *Carlson* v. *Schlesinger*, *supra*, *Callison* v. *United States*, *supra*, and *Allen* v. *Monger*, C-73-745RFP and *Moses* v. *Foley*, C-73-1012RFP (N.D.Cal. Aug. 23, 1974) decided by Judge Peckham of this Court.

[8] See, *supra*, Note 1.

[9] As the Court of Military Appeals stated in *United States* v. *Schmidt*, 16 USCMA 57, 59 (1966):

> "[T]he purpose behind this legislation is obvious and the right absolute within the strictures specifically delineated therein."

On the contrary, the military need to control petitioning arises only in extraordinary circumstances (such as in a combat zone as in *Carlson* v. *Schlesinger, supra*, or in an induction center where disruption is threatened as in *Callison* v. *United States, supra*), and thus it is the exception rather than the rule. Clearly such governmental interests are inadequate to outweigh the burden on personal liberty imposed by the regulations, especially where the regulations could be rewritten so as to apply only in those situations where they might be reasonably necessary.[10]

Consequently, I must conclude that the regulations, AFR 30-1(9) and the petinent parts of AFR 35-15, taken together, failed to meet the test of constitutionality under the First Amendment and the applicable case law. They are, therefore, invalid, and plaintiff was improperly disciplined for having breached them. Plaintiff is entitled to restoration of all benefits and privileges to which he was entitled prior to his removal from active duty status on April 17, 1974, including future active duty, compensation for wages lost as a result of said removal, and injunctive relief against all punitive actions taken or threatened by defendants by reason of the petitioning activities which are the subject of this lawsuit. Accordingly,

It is hereby ordered that plaintiff's motion for summary judgment is granted.

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[10] Chief Judge Bazelon suggests a format for alternative regulations in *Carlson* v. *Schlesinger, supra*, at 1344-1345 (dissenting opinion). This Court notes also that it is a much simpler matter for an administrative office to redraft its own regulations than for a legislature to revise its statutes.

It is further ordered that defendants' motion for summary judgment is denied.

Counsel for plaintiff shall prepare and file a judgment in accordance with this memorandum opinion and order in form approved by defendants on or before June 13, 1975.

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